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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-T-, INC.

DATE: JAN. 21, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and testing business, seeks to employ the Beneficiary as a "systems/programmer analyst–lead" under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the petition with findings of fraud against the Petitioner and willful misrepresentation against the Beneficiary. A motion to reopen was dismissed by the Director. The Petitioner filed an appeal, which we rejected as improperly filed. The matter is now before us on a motion to reopen and reconsider. The motion to reopen and the motion to reconsider will be denied.

The instant petition, Form I-140, was filed on July 1, 2011. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on December 24, 2010, and certified by the DOL (labor certification) on January 4, 2011. To be eligible for the job offered and the requested visa classification, the Beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N 158, 160 (Act. Reg'l Comm'r 1977). The priority date of the instant petition is December 24, 2010.

On March 18, 2013, the Director denied the petition on the ground that the evidence of record did not establish that the Beneficiary has a U.S. master's degree or a foreign equivalent degree, as required under the terms of the labor certification to be eligible for classification as an advanced degree professional and to qualify for the job offered. The Director also found that fraudulent documents were submitted as evidence that the Beneficiary earned a Master of Science degree from [redacted] The Director made findings of willful misrepresentation of a material fact against the Beneficiary and fraud against Petitioner.

The Petitioner filed a motion to reopen with supporting documentation. The Director dismissed the motion on October 17, 2013, finding that the Petitioner did not overcome the previous determination that the documentary evidence of the Beneficiary's master's degree from [redacted] was

[1] The priority date of an immigrant petition is the date the underlying labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

fraudulent, or the previous findings of misrepresentation against the Beneficiary and fraud against the Petitioner based on the submission of fraudulent documents. In addition, the Director found that the Beneficiary was not eligible for classification as an advanced degree professional based on a baccalaureate degree and five years of qualifying experience because the labor certification specifically requires a master's or foreign equivalent degree, and does not allow for a combination of education and experience.

The Petitioner filed two appeals with virtually identical supporting documentation. We rejected the appeals on June 26, 2015 and July 6, 2015, respectively, on the ground that the appeals were improperly filed. On July 28, 2015, the Petitioner filed the instant motion to reopen and motion to reconsider our decision dated July 6, 2015. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon review of the entire record, we will withdraw the Director's findings of fraud against the Petitioner and willful misrepresentation against the Beneficiary that were based on the submission of purportedly fraudulent documents. However, we affirm the Director's findings that the evidence of record does not establish that the Beneficiary is eligible for classification as an advanced degree professional or qualified for the job offered because he does not have a master of science or foreign equivalent degree as required in the labor certification. Accordingly, the petition will remain denied.

I. LAW AND ANALYSIS

A. The Roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides as follows:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are

qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS.[2] The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and

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[2] The legacy INS (Immigration and Naturalization Service) was replaced in part by USCIS (originally the Bureau of Citizenship and Immigration Services) when the Homeland Security Act of 2002 entered into force on March 1, 2003.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification, and whether the beneficiary qualifies for the offered position.

B. Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The terms "advanced degree" and "profession" are defined in 8 C.F.R. § 204.5(k)(2). The regulatory language reads as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. [The occupations listed in section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."]

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Furthermore, an "advanced degree" is either (1) a U.S. academic or professional degree or a foreign equivalent degree above a baccalaureate, or (2) a U.S. baccalaureate or a foreign equivalent degree followed by at least five years of progressive experience in the specialty.

Part H of the labor certification sets forth the following minimum requirements for the job offered:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	Computer Science, Engineering, MIS/IS, Mathematics, Communications, Science
5.	Training:	None required
6.	Experience in the Job Offered:	None required
7.	Alternate Field of Study:	Not acceptable
8.	Alternate Combination of Education and Experience:	Not acceptable

9.	Foreign Educational Equivalent	Acceptable
10.	Experience in an Alternate Occupation	Acceptable
10.A.	How many months?	12 months
10-B.	What job title(s)?	Software Engineer/Analyst, IT Projects/Technical Lead, Database Administrator

Thus, the labor certification requires a master's or foreign equivalent degree in one of the fields identified in Part H.4-B, and 12 months of experience in one of the jobs identified in Part H.10-B.

As evidence of the Beneficiary's educational credentials and experience the Petitioner submitted the following documentation with the Form I-140 and in response to the Director's notice of intent to deny the petition:

- Copies of a diploma and "Second Annual Examination" results from the [redacted] Pakistan, showing that the Beneficiary received a "Bachelor of Science" degree on February 21, 1989.
- Copies of a diploma, an official transcript, and a letter from the assistant registrar of [redacted] Pakistan, indicating that the Beneficiary received a "Master of Science in Computer Sciences" on August 20, 1999, after completing a four-quarter academic program from the summer of 1997 through the spring of 1998 at [redacted] Pakistan.
- A letter from the president of [redacted] dated October 29, 2010, stating that the Beneficiary had been employed since April 2002 as a "project manager/analyst" working on "all steps of software/system's project development life cycle."

The evidence demonstrates that the Beneficiary has a Bachelor of Science from the [redacted] in Pakistan. The documentation of record does not clearly indicate how long the Beneficiary studied for the degree. According to the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a Bachelor of Science degree in Pakistan is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (equivalent to a high school degree in the United States) and is comparable to two to three years of university study in the United States. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign degree equivalencies.[4] Accordingly, we

[4] USCIS utilizes EDGE as a primary resource for determining the U.S. equivalency of foreign degrees. AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management,

find that the Beneficiary's Bachelor of Science from the is equivalent to two to three years of study at a U.S. college or university. It is not equivalent to a U.S. bachelor's degree.

The Beneficiary's other degree is the aforementioned "Master of Science in Computer Science" from which was awarded after four quarters of academic courses. The diploma bears a stamp reading "Wyoming, USA" though the Beneficiary's studies were evidently conducted at the university's facility in Pakistan. According to EDGE, a Master of Science degree in Pakistan is awarded upon completion of two years of study beyond the two- or three-year bachelor's degree, and is comparable to a bachelor's degree in the United States. The Beneficiary's degree program in Pakistan, comprised just four academic quarters, which appears to be a little short of the standard master's degree in Pakistan. Even if we accept the Beneficiary's "Master of Science" from as a genuine master's degree in Pakistan, the academic equivalency of the degree in the United States would be a bachelor of science. Therefore, it does not make the Beneficiary eligible for classification as an advanced degree professional under the terms of the labor certification, which requires a master's degree or a foreign equivalent degree.

If the Beneficiary's "Master of Science" from were to be regarded as a U.S. credential, *arguendo*, because the diploma is stamped "Wyoming, USA," we would not view it as a qualifying master's degree (or any other level degree) for the purposes of this immigration proceeding because is not an accredited institution in the United States. The record indicates that has tried to establish itself in several states since the late 1990s – including Wyoming, Alabama, and California – without achieving accreditation from a nationally recognized accrediting agency in any state.

In the United States institutions of higher education are not authorized or accredited by the federal government.[5] Instead, the authority to operate and issue degrees is granted at the state level. State approval to operate, however, is not the same as accreditation by a recognized accrediting organization. Accrediting organizations are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria.[6] Institutions that meet an accrediting organization's criteria are then "accredited" by that organization.[7]

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administrative information technology and student services." *Id.* EDGE, as stated on its registration page, is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_ international_ publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

[5] *See* http://ope.ed.gov/accreditation.

[6] *Id.*

[7] *Id.*

The U.S. Department of Education (DOE) and the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, are the two entities responsible for the recognition of accrediting organizations in the United States.

While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting organizations that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.[8] According to the DOE, "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."[9] Accreditation ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and their students with access to federal funding.

The CHEA plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."[10] Like the DOE, CHEA recognizes accrediting organizations. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."[11] According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort."[12]

The DOE and CHEA recognize seven regional accrediting organizations in the United States. For Wyoming, the state stamped on the Beneficiary's "Master of Science" degree from [redacted] in 1999, the regional accrediting organization is the North Central Association of Colleges and Schools, The Higher Learning Commission (NCACS/HLC).[13] The NCACS/HCL website lists all accredited institutions, state by state, within its jurisdiction. [redacted] does not appear on Wyoming's list of accredited institutions, or any other state list of the NCACS/HCL. *See* http://www.hlcommission.org (accessed December 23, 2015).

Accreditation by NCACA/HLC provides assurance of a basic level of educational quality from the institution as well as the nationwide acceptance of its degrees. A degree from an unaccredited institution does not provide a sufficient assurance of quality or the nationwide acceptance of its degrees. Since the Beneficiary's "Master of Science" from [redacted] was not earned at an accredited institution of higher education in the United States, we find that it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

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[8] *Id.*

[9] http://www2.ed.gov/print/admins/finaid/accred/accreditation.html.

[10] www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.

[11] *Id.*

[12] *Id.*

[13] *See* http://www2.ed.gov/admins/finaid/acred/accreditation_pg6.html.

For all of the reasons discussed above, we conclude that the Petitioner has not established the Beneficiary's eligibility for classification as an advanced degree professional under section 203(b)(2) of the Act based on his "Master of Science" from Accordingly, the petition cannot be approved.

C. Qualifications for the Job Offered

To be eligible for approval under the immigrant visa petition, the Beneficiary must have all the education, training, and experience specified on the underlying labor certification as of the petition's priority date, which is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg'l Comm'r 1977).[14] In this case, the priority date is December 24, 2010.

The key to determining the job qualifications is found in Part H of the ETA Form 9089, which describes the terms and conditions of the job offered. It is important that the labor certification be read as a whole. In this case, the minimum level of education, training, and experience required for the proffered position of "systems/programmer analyst – lead" is stated on the ETA Form 9089 as follows:

- The minimum educational requirement is a master's degree in computer science, engineering, MIS/IS, mathematics, communications, or science, or a foreign educational equivalent (Part H, lines 4, 4-B, 7, and 9).
- There is no minimum training requirement (Part H, line 5).
- The minimum experience requirement is 12 months in a job such as software engineer/analyst, IT projects/technical lead, or database administrator (Part H, lines 6 and 10).

The Beneficiary does not meet the minimum educational requirement. As previously discussed, the Beneficiary's "Master of Science in Computer Sciences" from which was earned at the institution's School of Business and Commerce in Pakistan, is not equivalent to a U.S. master's degree. Though the diploma bears a stamp reading " in "Wyoming, USA" it does not qualify as a U.S. master's degree under the "advanced degree" definition of 8 C.F.R. § 204.5(k)(2) because it was not awarded by an educational institution accredited by a regional accrediting organization recognized by the DOE and CHEA. Since he does not fulfill the educational requirement in Part H of the labor certification, the Beneficiary does not qualify for the job offered. For this reason as well, the petition cannot be approved.

[14] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

D. Withdrawal of Fraud and Misrepresentation Findings

Willful misrepresentation of a material fact consists of a false representation of a material fact made with knowledge of its falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). Fraud consists of the same elements as willful misrepresentation of a material fact. *Id.* However, a fraud finding also requires an intention to deceive another party, and "the misrepresentation must be believed and acted upon by the party deceived to his [or her] disadvantage." *Id.* A misrepresentation is material if it had "a natural tendency to influence" the decision. *Forbes*, 48 F.3d at 442 (quoting *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

The Director found that the documentation submitted as evidence of the Beneficiary's "Master of Science" degree from was fraudulent. The Director found that the submission of this documentation to USCIS constituted fraud by the Petitioner and the willful misrepresentation of a material fact by the Beneficiary. While we have determined that the academic credential the Beneficiary earned at facility in Pakistan, is not equivalent to a U.S. master's degree, and that is not an accredited institution of higher education in the United States, we do not find that the documentation of the Beneficiary's degree from that institution is *per se* fraudulent. We conclude, therefore, that the evidence of record does not demonstrate that the Petitioner and the Beneficiary committed fraud and/or willful misrepresentation of a material fact in this proceeding. Accordingly, we withdraw the Director's findings of fraud against the Petitioner and willful misrepresentation against the Beneficiary.

II. CONCLUSION

Based on the foregoing analysis, we find that the petition must be denied on the following grounds:

- The Beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he does not have a U.S. master's degree in computer science, engineering, MIS/IS, mathematics, communications, or science, or a foreign equivalent degree.
- The Beneficiary does does not qualify for the proffered position under the terms of the labor certification, which requires a U.S. master's degree in computer science, engineering, MIS/IS, mathematics, communications, or science, or a foreign educational equivalent.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Therefore, the petition remains denied.

However, the Director's findings of fraud and willful misrepresentation against the Petitioner and the Beneficiary, respectively, are withdrawn.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-S-T-, Inc.*, ID# 15294 (AAO Jan. 21, 2016)